

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7031

ORIGINAL
WITH PROOF
OF SERVICE

75-703831

Consolidated with 75-7055 & 75-7057

To be argued by
LEONARD M. MARKS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE
ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MAHON
& CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY
& CO. INCORPORATED, J. H. CRANG AND CO., INVESTORS OVER-
SEAS BANK LIMITED,

Defendants,

ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT BERNARD CORNFELD

GOLD, FARRELL & MARKS
Attorneys for Defendant-Appellant Bernard Cornfeld
595 Madison Avenue, New York, New York 10022

Of Counsel:

Martin R. Gold
Leonard M. Marks
Charles B. Ortner

(4593)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

HOWARD BERSCH, :

Plaintiff-Appellee, :

-against- :

DREXEL FIRESTONE, INCORPORATED, :
DREXEL HARRIMAN RIPLEY, BANQUE :
ROTHSCHILD, HILL SAMUEL & COMPANY, :
LIMITED, GUINNESS MAHON & CO., :
LIMITED, PIERSON, HELDING & PIERSON, :
SMITH BARNEY & CO., INCORPORATED, :
J. H. CRANG & CO., and INVESTORS :
OVERSEAS BANK, LIMITED, :

Defendants, :

ARTHUR ANDERSEN & CO., I.O.S., :
LTD., and BERNARD CORNFELD, :

Defendants-Appellants. :

-----X

REPLY BRIEF OF DEFENDANT-
APPELLANT BERNARD CORNFELD

Without any support in the record, plaintiff makes the totally false assertions that the Swiss proceedings against Mr. Cornfeld are "unlikely to produce the monetary restitution due class members," and that "this is the only forum in which foreign class members can obtain meaningful redress . . ." (Brief of Plaintiff-Appellee, p. 91).

In fact, plaintiff is the only person who has filed an action in the United States. Moreover, as we discussed in our main brief, 395 IOS purchasers, including at least eighteen Americans, have filed and are litigating claims in Switzerland based upon the same offerings which are the subject of the present action in the District Court (192A-15-78, 34-49). Swiss counsel for these claimants have been paid one Swiss franc per share of stock involved in the proceedings plus a fee of 50,000 Swiss francs for the settlement of 90 claims. (297-A) These 90 claimants have been paid, and negotiations concerning settlement of approximately 200 other claims are presently pending. (Id.)

Plaintiff's assertion that the Swiss claimants are having "difficulty . . . recovering in Switzerland" is made from whole cloth. Before his release from Swiss prison, Mr. Cornfeld was required to post cash bail in the sum of \$1.6 million. This assures that Mr. Cornfeld will return to Switzerland to attempt to resolve all claims (as he has already done), and provides a financial fund if the claimants in Switzerland are successful. If Bersch were truly

interested in resolving his own claim, he would clearly be best advised to file in Switzerland, as 18 other Americans have done, rather than attempt to invoke American class action procedures on behalf of 100,000 persons resident all over the world.

Plaintiff also contends that an attorney representing some claimants in the Swiss proceedings decided not to intervene in this action because plaintiff's counsel had informed him that the claimants in Switzerland were already included as members of plaintiff's class in accordance with Judge Frankel's decision dated June 28, 1972 *. (Brief of Plaintiff-Appellee, pp. 5-6, 91.) But this is precisely the heart of the problem facing Cornfeld. He is being forced to defend the same claims, by the same claimants, in two different jurisdictions. His difficulties are compounded by the absence of res judicata effect

* Plaintiff conveniently overlooks the fact that his papers in support of a class action determination grossly misrepresented the nature and extent of the Swiss proceedings. Cornfeld, the only defendant who was apparently aware of these proceedings, had not even been served by plaintiff until long after Judge Frankel had rendered his tentative class action decision.

abroad of any judgment which the American court may render in a class action proceeding -- a classic case of one-way intervention prohibited by Rule 23.

Equally significant is plaintiff's failure to answer the arguments raised as to the absence of subject matter jurisdiction with regard to claims of individual foreign purchasers. He rather argues that since various administrative matters relating to the offerings occurred here, the court has jurisdiction. He ignores the discussion contained in our main brief (pp. 17-18) that the following controlling factors all had a foreign situs with respect to foreign purchasers of IOS stock:

- (a) the place where the representations were made by the defendants;
- (b) the place where representations were received;
- (c) the place where purchasers relied on the representations;
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (e) the place where foreign purchasers and where IOS tendered performance.

Plaintiff continues to refuse to deal with the fact that, from the standpoint of the tens of thousands of foreign purchasers whom he claims to represent, their transactions had no contact of any kind with the United States, they never expected that American securities laws would govern, and many are pursuing their claims in Switzerland, the headquarters of IOS.

Plaintiff also misconceives the principles established by Zahn v. International Paper Co., 414 U.S. 291 (1973) and Snyder v. Harris, 394 U.S. 332 (1969). Those cases require that in a class action, each class member must meet the relevant subject matter jurisdiction predicates to pursue his claim as a part of the class. If the basis of the exercise of power is diversity of citizenship, each class member's claim must meet the jurisdictional amount requirement; if the basis of jurisdiction is a federal question, each class member must have, individually, a claim cognizable under the relevant federal statute.

Under plaintiff's construction of Zahn and Snyder, a foreign class member who would not be able to assert a claim under §10-b in his own right may

nevertheless have it asserted on his behalf by an American resident here who can invoke subject matter jurisdiction.

Zahn and Snyder make clear that Rule 23 does not permit those who have justiciable federal claims to bootstrap into federal court claims of those who are otherwise not properly here.

CONCLUSION

The order sustaining subject matter jurisdiction should be reversed, and the complaint should be dismissed.

Dated: New York, New York
February 27, 1975

Respectfully submitted,

GOLD, FARRELL & MARKS
Attorneys for Defendant-
Appellant Bernard Cornfeld

Of Counsel:

Martin R. Gold
Leonard M. Marks
Charles B. Ortner

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

HOWARD BERSCH,	:	
Plaintiff-Appellee,	:	Docket Nos.
v.	:	75-7038
	:	75-7055
DREXEL FIRESTONE, INCORPORATED,	:	75-7057
et al.,	:	
Defendants,	:	<u>ERRATA SHEET</u>
ARTHUR ANDERSEN & CO., I.O.S.,	:	
LTD. and BERNARD CORNFELD,	:	
Defendants-Appellants.	:	

-----x

Plaintiff-Appellee wishes to call to the Court's attention the fact that pages 8 and 9 in his Petition for Rehearing were inadvertently transposed. Accordingly, plaintiff-appellee respectfully requests that the Court read page 8 as page 9 and page 9 and page 8.

Dated: New York, N.Y.
May 13, 1975

Very respectfully yours,

SILVERMAN & HARNES

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STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

SIMONE C. ANDRE, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 333 East 53rd Street, New York, New York 10022

That on the 13th day of May 1975, deponent served the within Errata Sheet

upon the attorney slisted below in this action at the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States postal service within the State of New York.

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New York, New York

Simone C. Andre
Simone C. Andre

Sworn to before me
this 13th day of May, 1975

Rosalie A. McGovern

Notary Public

ROSALIE A. McGOVERN
NOTARY PUBLIC, State of New York
No. 24-0706100
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

SILVERMAN & HARNES

Attorneys for

Office and Post Office Address

75 ROCKEFELLER PLAZA

BOROUGH OF MANHATTAN NEW YORK. N. Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

SILVERMAN & HARNES

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BOROUGH OF MANHATTAN NEW YORK. N. Y. 10019

To

Attorney(s) for

Index No. 75-7038 75-7055 Year 19
75-7057

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HOWARD BERSCH,

Plaintiff-Appellee,

V.

DREXEL FIRESTONE, INC., et al.,

Defendants,

**ARTHUR ANDERSEN & CO., I.O.S.,
LTD., and BERNARD CORNFELD,**

Defendants-Appellant

ERRATA SHEET

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Attorneys for **Plaintiff-Appellee**

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(212) 765-7884

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for



received ² copies of the within
Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

Sign Shuman & Harrop McGovern

For: Schuman & Harrop Esq(s).

Att'ys for Plaintiff

Received ² copies of the within
Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

3-3-1975
Sign WEISS, RIFKIND, WHARTON & GARRISON

By Paul Weiss Rifkind Wharton & Garrison
For: Garrison Esq(s).

Att'ys for Defendant Investors
Business Bank Ltd.

received ² copies of the within
Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

Sign Joan C. Middleton
Wachtell Lipton Rosen & Katz
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Att'ys for Defendant Appellat
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received ² copies of the within
Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

Sign Y. Schuch
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For: Gregory Prieston Esq(s).

Att'ys for Defendant United
Investment Inc. Pierson Kellogg
Pierson Pierson Matos & Co. Ltd.
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received ² copies of the within
Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

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Att'ys for Defendant Smith
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Partners

received ² copies of the within
Reply Brief of Appellat Cornfeld
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Att'ys for Def Appellat Arthur
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Reply Brief of Appellat Cornfeld
this 3 day of March, 1975.

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Att'ys for Defendant N.J. Corp & Co.

COPY RECEIVED
TIME 1:05
MAR 3 1975
DAVIS POLK & WARDWELL

